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In the
SUPREME COURT OF THE UNITED STATES
October Term, 2006

ROBERT AYERS, Acting Warden, San Quentin State Prison, California, *Petitioner*,
v.
WILLIAM CLARK, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF LOS ANGELES COUNTY DISTRICT ATTORNEY IN SUPPORT OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

No.

ROBERT AYERS, Acting Warden, San Quentin State Prison, California, *Petitioner,*

v.

WILLIAM CLARK, *Respondent.*

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Steve Cooley, District Attorney of Los Angeles County, respectfully submits this brief, as amicus curiae, in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, with the written consent of the attorneys for Petitioner and Respondent, as follows:

The undersigned, as attorneys for the Petitioner and the Respondent in the above-captioned matter, consent to the filing by the District Attorney of Los Angeles County of an amicus brief in support of the Petitioner.

Executed at Los Angeles County this

date: August 28 2006 date: 8/29/06

Attorney for Petitioner Attorney for Respondent

INTEREST OF AMICUS CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime[1] in the most populous county in California, has a strong interest in effectuating the intent of the California Legislature and preserving the finality of the judgments of California's courts of criminal jurisdiction.

The Ninth Circuit (*Clark v. Brown*, 450 F.3d 898 (9th Cir. 2006)), focusing on one phrase in *People* v. *Green*, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980) (*Green*), reversed the judgment of death in *People v. Clark*, 50 Cal. 3d 583, 789 P.2d 127, 268 Cal. Rptr. 399 (1990) (*Clark*) by extending the *Bouie*[2] doctrine to special circumstance findings and the ex post facto prohibition to judicial decisions. This stringent review procedure, contrary to this Court's directive of deference to judicial reevaluation and refinement of legal doctrines, will "place an unworkable and unacceptable restraint on normal judicial processes ... incompatible with the resolution of uncertainty that marks any evolving legal system" (*Rogers v. Tennessee*, 532 U.S. 451, 457, 461-62 (2001) (*Rogers*)) and destroy the finality of many decisions.

If left to stand, *Clark v. Brown* will affect many death penalty cases and may be the ground for reversing any case in which the California Supreme Court interpreted a new statute and then tried to clarify or re-evaluate its interpretations to bring them into conformity with legislative intent and common sense. There are many such new statutes. Since the decisions in *Green* and *Clark*, the number of categories of special circumstances that may subject a defendant to the death penalty has gone from five to 22. Cal. Penal Code § 190.2(a) (West 2006). Further, if murder is

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1. The California general law provides that:
"The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses."
Cal. Government Code, § 26500 (West 1988).

2. *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964) (*Bouie*).

committed while one is engaged in, is an accomplice in, or is fleeing after, the commission or attempted commission of any of 12 listed felonies, such a felony-murder also constitutes a special circumstance. Cal. Penal Code § 190.2(a)(17) (West 2006).

In recent years, to curb recidivism and punish heinous crimes more appropriately with a view toward deterring the most serious kinds of misconduct that threaten public safety, the California Legislature has amended and enacted a number of statutes re-classifying certain crimes as serious and violent offenses and providing for additional penalties for recidivism. *See, e.g.*, Cal. Penal Code §§ 667, 667.5(a), 667.5(c), 1192.7(c) (West 2006) . In addition to increased penalties for substantive crimes and recidivism, certain conduct, such as the intentional discharge of a firearm causing great bodily injury or death in the commission of certain offenses (Cal. Penal Code § 12022.53(d) (West 2006)) and the infliction of aggravated mayhem or the existence of certain circumstances connected to the commission of specified sex offenses (Cal. Penal Code §§ 667.61(a), (c) and (d) (West 2006)), is now punishable by a life sentence with a minimum 25-year term before parole eligibility.

Thus, the California Supreme Court will be confronted repeatedly with the need to interpret new criminal and penalty statutes. Yet the foregoing examples are but a few of the new substantive and penalty provisions whose application will be negatively impacted by the Ninth Circuit's extension of *Bouie* under its all-too-literal due process analysis of State decisional law. Amicus therefore has a strong interest in urging that certiorari be granted.

SUMMARY OF ARGUMENT

Using a stringent due process analysis, the Ninth Circuit found that affirming the death penalty in *Clark*, 50 Cal. 3d 583, 789 P.2d 127 violated the ex post facto prohibition. The Ninth Circuit thus extended the scope of the *Bouie* doctrine to apply to penalties and imported ex post facto principles into the analysis of judicial decisions. Ignoring the holdings of *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990), *Estelle v. McGuire*, 502 U.S. 62, 72

(1991), it granted federal habeas corpus relief for alleged instructional error, and overlooking the exposition in *Lockhart v. Fretwell*, 506 U.S. 364, 371-373 (1993) of the *Teague v. Lane*[3] retroactivity rule in the context of *Butler v. McKellar*, 494 U.S. 407, 414 (1990), it went beyond due process to accord the defendant an entitlement to "have the state court make an error in his favor." *Nix v. Whiteside*, 475 U.S. 157, 186-187 (1986) (Blackmun, J., concurring).

Here, the State Supreme Court had fashioned an exception to a new statute, but its narrow holding became generalized in the *Green* instruction, which the Supreme Court has since then repeatedly held to be inapplicable to concurrent intent felony-murders. Certiorari should be granted to address whether federal courts, in conducting a due process review under *Bouie*, should accord the deference to judicial refinement and reevaluation of legal doctrines required by *Rogers* in greater measure when reviewing a state court decision interpreting or clarifying a new statute or state-law judicial doctrine.

The California Supreme Court, in applying the arson- murder special circumstance to Clark's actions, did not violate due process, but the Ninth Circuit's misreading of *Green* led it to so conclude. Following this Court's mandates in *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976), the People through the initiative process had enacted California Penal Code section 190.2 (West 1978), which narrowly delineates the special circumstances that justify the imposition of the death penalty by a jury in any given case. Section 190.2 gave clear notice that first degree murder committed during the commission of arson is such a special circumstance.

In 1980, while the current death penalty statute was new, the California Supreme Court in *Green* reviewed the applicability of the felony-murder special circumstance to a premeditated murder wherein the victim was robbed to conceal her identity. The State Supreme Court interpreted the special circumstance

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3. *See, Teague v. Lane*, 489 U.S. 288, 310 (1989).

felony-murder provision as not including such a case in its purview because the robbery was incidental to the primary crime of murder. *Green*, 27 Cal. 3d at 61. *Green* created an exception to the felony-murder special circumstance provision compelled under its facts; it did not add a requirement that was never expressed or implied in the statutory language: namely, that the murder be carried out "*in order to advance* [the] independent felonious purpose" of another crime. *Green*, 27 Cal. 3d at 61 (emphasis added). Neither should legislative effect be given to *Green* on *Bouie* review, usurping on the strength of one phrase in the *Green* opinion, the province of the Electorate and the Legislature, particularly since no amendment was needed to cure any putative constitutional infirmity in the statute.

This Court has recognized that in determining whether a judicial decision was so unforeseeable as to violate the due process right to notice under *Bouie*, due consideration must be given to the legitimate need that courts have to revisit prior decisions on an ongoing basis to review, modify, and clarify judicial doctrines. *Rogers*, 532 U.S. at 457, 462. That need is the more compelling where the statutes are new and judicial doctrines are of recent origin.

A federal court's due process inquiry in reviewing state court judgments and decisions should focus – not upon strict adherence to every corner and edge of decisional law, giving literal language preference over the legal principles upon which those decisions rest – but rather upon the constitutional validity of the judgment or decision as a whole in the context of existing statutory and decisional law seen from a common sense perspective, with a view toward avoiding needless reversals and recognizing that state courts are also capable of properly interpreting the Federal Constitution and especially their own laws. Because the Ninth Circuit's procedure in reviewing state court decisions as evidenced in *Clark v. Brown* puts "an unworkable and unacceptable restraint on normal judicial processes" (*Rogers*, 532 U.S. at 461), amicus urges this Court to grant certiorari.

ARGUMENT

I. THE NINTH CIRCUIT MISCONSTRUED *PEOPLE V. GREEN* AS PRECLUDING A FELONY-MURDER SPECIAL CIRCUMSTANCE FINDING WHERE THE FELONY WAS COMMITTED TO FACILITATE THE MURDER

A. The Death Penalty Statute Does Not Require A Felony-Murder To Advance An Independent Felonious Purpose, Nor Does It Preclude A Felony-Murder Special Circumstance Finding Where There Was A Concurrent Intent To Kill While Carrying Out Another Felonious Purpose

When Clark killed Gawronski in 1980, his actions fell squarely under the arson-murder special circumstance statute. California Penal Code section 190.2(a)(17) provided for a "special circumstance" making Clark subject to death or life in prison without possibility of parole, where the jury finds:

> The murder was committed while the defendant was engaged in or was an accomplice in the commission of, or the immediate flight after committing or attempting to commit the following felonies: . . . (viii) Arson in violation of Section 447.

Clark, 50 Cal. 3d at 606; Cal. Penal Code § 190.2(a)(17) (West 1980).

Nowhere in the statute is there any requirement that the murder must be committed to advance an independent felonious purpose. Nor does the statute preclude a special circumstance murder finding if the perpetrator had a concurrent intent to kill when he committed the felony. The statute, as enacted, was in compliance with the holdings of *Furman v. Georgia* and *Gregg v. Georgia* and gave Clark clear notice that he could be subject to the death penalty in setting fire to his victims' home and killing Gawronski in the course of the arson. Since the *Green* exception has very narrow applicability (see, *infra*) not relevant to *Clark*, the Ninth Circuit engaged in judicial lawmaking in applying

Green to all felony-murder special circumstance cases and reversing the death penalty in *Clark* on that ground.

B. Because Callous Disregard For Human Life And Deliberate Exposure Of Society To The Danger Of Death Justify The Capital Penalty For Felony-Murder, *Green* Only Established A Narrow Exception To The Felony-Murder Special Circumstance If The Felony, Being Incidental To An Intended Murder, Created No Additional Danger To The Public

It is well established that a murder conviction is justified under the felony-murder rule because the defendant deliberately participated in the felony, knowing the inherently dangerous nature of the criminal activity involved. *People* v. *Phillips*, 64 Cal. 2d 574, 582, 414 P.2d 353, 51 Cal. Rptr. 225 (1966), overruled ; *People v. Mattison*, 4 Cal. 3d 177, 184, 481 P.2d 193, 93 Cal. Rptr. 185 (1971), *People v. Lopez*, 6 Cal. 3d 45, 52, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971) (*Lopez*). Additionally, if the defendant participates in the commission or attempted commission of any of the felonies listed in the death penalty statute (Cal. Penal Code § 190.2(a)(17)(West 2006)), the resulting murder committed in the course of the felony is not only a first-degree murder, but also one that is punishable by death.

In affirming the validity of the felony-murder special circumstance provision, the Supreme Court reasoned:

> it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape.

Green, 27 Cal. 3d at 61. The phrase, "who killed in cold blood in order to advance an independent felonious purpose," led to many misinterpretations, including the one at issue here.

The basis of the distinction, justifying the imposition of a capital sentence, between those who commit first-degree murder and those who commit felony-murder, however, cannot turn

upon the non-existence of a *prior* intent to kill in the case of felony-murder, for then the California Legislature would not have classified *premeditated* murder as murder in the first degree, indicating culpability of the first magnitude. The basis for justifying the capital penalty for felony-murder is rather the moral culpability of the perpetrator, measured in part by participation in an inherently dangerous felony (*see Pizano v. Superior Court of Tulare County*, 21 Cal. 3d 128, 136, 139, 577 P.2d 659, 145 Cal. Rptr. 524 (1978) (*Pizano*), *see also People v. Dillon*, 34 Cal. 3d 441, 453, 668 P.2d 697, 194 Cal. Rptr. 390 (1983), *cf. Green*, 27 Cal. 3d at 73), but more particularly the callousness of the conscious and wanton disregard for human life (*Pizano*, 21 Cal. 3d at 134, 139) evidenced by the unflagging pursuit of that dangerous felonious purpose.

The California Supreme Court must have had this point in mind in using the words "in cold blood" and "execution-style slaying of the victim ...." (*Green*, 27 Cal. 3d at 61), i.e., the cold-blooded, execution-style killing is not morally more reprehensible than a premeditated murder merely because it occurs "while the defendant [is] engaged in ... the commission of ..." (Cal. Penal Code § 190.2(a)(17) (West 2006)) another felony; rather, the felonies specified in the death penalty statute are, in the first place, especially heinous or inherently particularly dangerous to life, and, secondly, the fact that the defendant is not deterred in their commission by the prospect of murder, but cold-bloodedly advances toward completion of his felonious undertaking, is particular proof of "an abandoned and malignant heart" (Cal. Penal Code § 188 (West 2006)).

That it is the cold-blooded, inexorable manner of the killing reflecting callousness or a conscious and wanton disregard for human life which makes the perpetrator deserving of the death penalty is supported by the fact that this characteristic is shared by many of the other listed special circumstances: for financial gain, using explosives, inflicting torture, killing a peace officer in the performance of duty, to prevent a witness from testifying, multiple murders, or murder in the commission of certain inherently dangerous or depraved felonies: kidnaping, robbery,

burglary, child molestation, and rape. Cal. Penal Code §§ 190.2(a) , (b)), and (c) (West 1978). On the other hand, the serious and violent nature of the felonies listed in the statute under the felony-murder special circumstance creates an additional danger to the public during the commission of the felony, either because of the inherently dangerous nature of the felonies, or because of the increased danger to the victim, or because others will be put in harm's way while trying to stop the crime or help the victim, as was the case with the neighbors in *Clark*, who rescued the baby from the fire.

In *Green*, the defendant had planned and carried out the murder of his wife by having friends lure her from her friend's house; they drove to a remote location, where he had her strip, and then shot her. He took her rings, purse and clothes to hide her identity. *Green,* 27 Cal. 3d at 13-17, 51. Although the jury had found a robbery-murder special circumstance, the intent in robbing the wife appeared to be to leave her unidentifiable in a remote place (*id.* at 50, 57), and the jury was concerned that what occurred was in fact "a murder ... and a robbery was just a second thing to it ...." *Id.* at 60. The California Supreme Court reversed the robbery- murder special circumstance finding, reasoning that "[t]he Legislature's goal [of distinguishing between murderers] is not achieved ... when ... the robbery is incidental to the murder ... because its sole object is to facilitate or conceal the primary crime." *Id.* at 61.

The reasoning was correct under *Green*'s given facts, but because the opinion did not entirely explain the legislative distinction in terms of its rational basis, it gave rise to the unfortunate and erroneous conclusion drawn by the Ninth Circuit in this case: namely, an unpremeditated murder perpetrated during the commission of arson could be punishable as a capital crime, but not a premeditated murder, if it was accomplished or facilitated by the commission of arson. The *Green* Court reversed the special circumstance finding because the robbery, in the way in which it occurred, was not an "inherently dangerous" felony; i.e., Green did not intentionally expose the public to danger or increase the victim's likelihood of death – Green and his victim

were in a secluded area, and his intent was always to murder the victim.

C. *Green* Neither Required A Felony-Murder To Advance An Independent Felonious Purpose Nor Did It Preclude A Special Circumstance Finding Of Felony-Murder Where An Intent To Kill Existed Concurrently With Another Felonious Purpose

Neither the California Supreme Court's rationalization of the felony-murder category in the death penalty statute, nor its restrictive application of the statute in a special case, should be misinterpreted as judicial legislation.

Although the words, "in order to advance an independent felonious purpose," are found in the *Green* decision, it was not the holding of the case "that *only* a murder for the purpose of advancing the independent felony could be a murder in the commission of a [specified felony] for special circumstance purposes." *Clark*, 50 Cal. 3d at 653 (Kaufman, J., concurring and dissenting). That language was part of a description of the mens rea that might serve to justify a capital sentence in a felony-murder. Neither did *Green* preclude a robbery-murder special circumstance merely because the intent to kill also existed; instead, *Green* only created an exception for a murder in which a robbery was technically, but merely incidentally, committed, as a happenstance or afterthought. *Id.*

Petitioner points out that it was foreseeable (*Webster v. Woodford*, 369 F.3d 1062, 1074-75 (9th Cir. 2004)) that the "concurrent objectives" ruling of *People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981) (*Murtishaw*) would be imported into the interpretation of the death penalty statute. Petition for Writ of Cert., p. 8. Indeed, but for the misleading jury instruction which *Green* spawned, concurrent objectives would not even be in issue under the plain language of the statute. It should be noted that none of the listed felonies would merge with the murder.

While under due process we may be limited to the holdings of cases decided before Clark's crime was committed, we are not

precluded from arguing the plain language of the statute or a fair reading of the cases decided before Clark. For purposes of showing what is a reasonable view of the state of the law, however, subsequent decisions are relevant if they are consistent, as tending to show that the trend did not deviate from precedent.

Prior decisional law is consistent in finding the felony-murder rule justified by the danger inherent in the felonies which the defendant intentionally perpetrated with conscious disregard for the deadly consequences. The intent to kill was satisfied by the malice implied in that callous or wanton disregard for human life. Murder was fixed at first degree for listed felonies and second degree for other inherently dangerous felonies. *Lopez*, 6 Cal. 3d at 47, 49. In *Green* the California Supreme Court created an exception to the special circumstance robbery-murder where the robbery was not the intentional felonious conduct which created a danger resulting in harm, but only incidental to the intended murder. Under *Murtishaw*, 29 Cal. 3d 733, concurrent intent did not preclude application of the felony-murder rule.

The California Supreme Court made it clear that *Green* is not applicable if the defendant had independent albeit concurrent goals for the felony and the murder (*People v. Robertson*, 33 Cal. 3d 21, 52, 655 P.2d 279, 188 Cal. Rptr. 77 (1982) (*Robertson*), *Clark*, 50 Cal. 3d at 608-609) and that *Green* did not stand for the proposition that, for a felony-murder special circumstance to be found, the murder must carry out or advance the purpose of the felony (*People v. Horning*, 34 Cal. 4th 871, 907, 102 P.3d 228, 22 Cal. Rptr. 3d 305 (2004) (*Horning*)).

Seen in its full context, the "concurrent intent" ruling of *Murtishaw* and *Robertson* was not a new development in the law of the felony-murder category of special circumstances, but a continuation of a well-established legal theory of the felony-murder rule. Under that rule, it was never the absence of a prior intent to kill that allowed a homicide in the course of a felony to be designated felony-murder, but it was the malice implied in the intentional commission of an inherently dangerous felony with wanton disregard of the danger to human life that permitted a homicide in the commission of a felony to be

designated a murder. The murder in *Green* failed to qualify as a special circumstance felony-murder, not because that murder was not the handmaiden of the robbery, but because the robbery, being incidental, seemed to lack the intensity of purpose necessary to impute wanton disregard for danger to life and to make the intentional murder more reprehensible.

The arson perpetrated by Clark, whatever Clark's intent, was an inherently dangerous felony specified in the special circumstances statute. It is irrelevant to the felony-murder whether Clark intended to kill David Gawronski by burning him to death or by shooting him after the fire had driven him from his home, or not at all. The requisite felonious intent is only the intent needed to set an inhabited building on fire willfully and maliciously. Cal. Penal Code § 447a (West 1978). Clark had this intent, and he carried it out with all the callous disregard for loss of human life which the special circumstance statute was intended to address. In committing arson, he not only killed his intended victim, but he also injured the victim's wife and risked the lives of the baby and the neighbors who went into the burning building to save the baby. In spite of the danger and foreseeable consequences, Clark proceeded in cold blood.

Amicus urges this Court to direct that due process analyses of state court judgments and decisions be conducted with a view of the entire context of the state's statutory and decisional law. Further, due regard may be given to later decisions where such decisions are consistent with prior case law and tend to support a view of the case or judgment under review as being consistent with constitutional principles.

II. State Courts Must Be Afforded Great Latitude In Clarifying New Statutes Or Modifying Or Revising Judicial Doctrines Involving Novel Areas Of Law

In our legal tradition of evolving jurisprudence, courts have an important and legitimate need to review, modify, and clarify judicial doctrines, and to revisit prior decisions on an ongoing basis. This Court recognized (in *Rogers*, 532 U.S. at 457, 462)

that in determining whether a particular judicial decision was so unforeseeable as to violate the due process right to notice under the *Bouie* doctrine, the judicial evolutionary need must be accommodated, especially where a state court is faced with interpreting new statutes or expounding or applying judicial doctrines of recent origin.

Bouie held that when an "unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Bouie*, 378 U.S. at 354-55. A due process violation occurs when the "state court's construction of a criminal statute was *so* unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him." *Id.* at 354 (emphasis added).

This Court has historically demanded a very high degree of unforeseeability as a prerequisite for *Bouie* error: the judicial interpretation must be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 353; *accord Rogers*, 532 U.S. at 457. Moreover, the due process right to notice requires only "'reasonable warning'" that one's conduct is proscribed; it does not require "fundamentally similar prior cases." *Bradshaw v. Richey*, 126 S. Ct. 602, 604, 163 L. Ed. 2d 407 (2005) (citing *United States v. Lanier*, 520 U.S. 259, 269-70, (1997)). As this Court warned, overly stringent applications of *Bouie* would have an unwarranted chilling effect on the courts' traditional and legitimate function of developing and refining judicial doctrines on an ongoing basis:

> In the context of common law doctrines . . ., there often arises a need to clarify or even to reevaluate prior opinions as *new circumstances and fact patterns present themselves.*

Rogers, 532 U.S. at 461 (emphasis added) (declining to import ex post facto principles into the *Bouie* doctrine).

The "unexpected and indefensible" standard of *Bouie* therefore strikes a balance between the due process interest in

preventing "vindictive or arbitrary judicial lawmaking" and the courts' need to "reevaluat[e] and refin[e]" judicial doctrines "as may be necessary to bring the common law into conformity with logic and common sense." *Rogers*, 532 U.S. at 461-62.

> [T]he fact of the matter is that common law courts then, as now, were deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience. Due process clearly did not prohibit this process of judicial evolution at the time of the framing, and it does not do so today.

Id. at 462.

The "*Bouie* doctrine" cases heretofore decided by this Court have generally involved judicial interpretations or expansions of old, well-established statutes or common law doctrines.[4] This Court has not yet squarely addressed whether the deference to judicial reevaluation and refinement of legal doctrines required by *Rogers* should be amplified in cases involving a state court's interpretation of a recently enacted statute or of a fairly new state-law judicial doctrine.

Here, the allegedly "unforeseeable" state court ruling was a Supreme Court opinion interpreting a special circumstance statute enacted only four years before Clark's crime. Moreover, the judicially-created exception to that statute at issue here ("the *Green* rule") was first announced less than two years before the crime. At the time of the crime, the California Supreme Court had not decided the precise issue relevant to *Clark*: whether

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4. *See United States v. Lanier*, 520 U.S. at 266 (Reconstruction Era civil rights statute); *Marks v. United States*, 430 U.S. 188 (1977) (decades-old federal obscenity statute); *Rose v. Locke*, 423 U.S. 48, 53 (1975) (per curiam) (decades-old Tennessee statute derived from common law, prohibiting "crimes against nature"); *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (decades-old Missouri statute defining "arrest"); *Rabe v. Washington*, 405 U.S. 313, 316 (1972) (per curiam) (century-old state obscenity statute). In *Bradshaw v. Richey*, 126 S. Ct. 602, this Court addressed the intepretation of a state aggravated murder statute enacted only four years before the crime, but the novelty of the statute was not an articulated basis of the Court's analysis.

Green applied where a defendant harbored multiple, concurrent objectives for committing arson-murder. State courts grappling with a newly-created and unsettled area of state law need to be given greater leeway to clarify, refine, and modify state law.

On the other hand, because *Green* involved an exception to, rather than the normal case under the felony-murder rule, the focus was on the edge, as it were, rather than at the center of the area of legal inquiry, so that the view was accordingly skewed. As the function of the highest appellate court is to establish guidelines and general rules rather than to correct error, the formulation of the exception to the felony-murder rule, coming from the California Supreme Court, became known as the *Green* rule, rather than the *Green* exception. Adding to this distortion was the concern with over-breadth under the *Furman-Gregg* mandate. The California Supreme Court reversed the robbery-murder special circumstance under the facts of *Green*, but the displacement of the felony-murder rule by the *Green* exception led, in the eagerness to avoid constitutional over-breadth, to the legally and logically incorrect *Green* instruction.

Where once the pursuit of an inherently dangerous felonious purpose in wanton disregard of the danger to human life *sufficed* to imply malice under the felony-murder rule, the existence of malice in the commission of an intentional murder, under the *Green* instruction, would not support a felony-murder special finding notwithstanding the temporal nexus between the murder and an independent felony, *unless the murder served the purpose of the independent felony*. *Clark*, 50 Cal. 3d at 607, n. 14. Under the Ninth Circuit's expansion of the *Green* exception, if the felony's sole purpose was to facilitate the intentional murder, it was "'incidental'" and "did not qualify a defendant for the death penalty under the felony- murder special circumstances statute." *Clark v. Brown*, 450 F.3d at 909-10.

By this reasoning, the arsonist who unintentionally kills is subject to a capital penalty, but one who intentionally burns his victim to death by setting fire to his house is not. The felonious intent is the same, as is the resulting harm, but the morally more culpable murderer will not be subject to as heavy a penalty as the

improvident arsonist.

However, not only does the Ninth Circuit's expansion of *Green* lead to absurd results, its analysis also extends *Bouie* to reach results inconsistent with federal precedents.

III. *BOUIE V. CITY OF COLUMBIA* IS NOT APPLICABLE TO A SPECIAL CIRCUMSTANCE FINDING

Bouie, which struck down a judicial retroactive expansion of trespass (statutorily defined as illegal *entry*) to cover illegally *remaining* on legally entered premises (*id.* 378 U.S. at 349-50), has hitherto been invoked against judicial decisions enlarging the scope of criminal liability to cover previously non-criminal conduct.[5]

The Ninth Circuit, relying on Ex Post Facto Clause principles, extended *Bouie* to overturn *Clark* because it believed that *Clark increased the penalty* for conduct which was clearly defined as first-degree murder when the crime was committed.[6] In so doing, it reached a decision that conflicted with its own past decisions. *McSherry*, 880 F.2d at 1056 (*Bouie* inapplicable unless someone "pursuing ... otherwise ... innocent behavior could be ensnared by the statute with no warning whatsoever"); *see also Darnell v. Swinney*, 823 F.2d 299, 301 (9th Cir. 1987) (*Bouie* not violated where defendant "clearly had fair warning that his contemplated conduct ... was criminal").

However, the ex post facto language in *Bouie* was dicta. *Rogers*, 532 U.S. at 458-59, citing *Bouie* 378 U.S. at 353-54, 362.

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5. *Marks v. United States*, 430 U.S. 188 (broadened "obscenity" definition not retroactively applicable to charge of transporting obscene materials); *Rabe v. Washington*, 405 U.S. at 316; *McSherry v. Block*, 880 F.2d 1049, 1053 n.4 (9th Cir. 1989); *Darnell v. Swinney*, 823 F.2d 299, 301 (9th Cir. 1987) ("fair warning that ... contemplated conduct constitutes a crime" required under *Bouie*).

6. *Webster v. Woodford*, 369 F.3d at 1068 did not *explicitly* hold *Bouie* applied to judicial enlargements of the scope of California's special circumstance provisions and ultimately *rejected* petitioner's claim of unforeseeable expansion. *Id.* at 1070-72, 1074.

The *Bouie* doctrine is based on the Due Process Clause, not the Ex Post Facto Clause (applicable only to legislative acts); these clauses differ in scope, and *Calder* (*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.)) limitations specific to ex post facto legislation should not be imported into *Bouie*'s due process doctrine because of "institutional and contextual differences" between the legislative and judicial bodies and how they function. *Rogers*, at 459-60. Moreover, such limitations[7] "would place an unworkable and unacceptable restraint on normal judicial processes ... incompatible with the resolution of uncertainty that marks any evolving legal system." *Id.* at 461.

Clark had fair warning that arson-murder was a special circumstance. In any case, whether Clark's crimes supported such a finding does not implicate *Bouie* concerns.

IV. Federal Habeas Corpus Is Unavailable to Review Instructional Error

The Supreme Court in *Green* reversed the death penalty on factual, not constitutional, grounds, because murder was the intended crime and robbery was committed as an afterthought. *Green*, 27 Cal. 3d at 49, 59-62. The *Green* instruction is thus extraneous to the felony-murder special circumstance statute.

Fairly stated, decisional law prohibited felony-murder special circumstance findings[8] only when the specified felony

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7. Prohibited are laws which after the fact (1) criminalize innocent acts; (2) aggravate crimes; (3) increase punishment; or (4) alter evidentiary rules to require less or different testimony for conviction. (*Accord*, *Carmell v. Texas*, 529 U.S. 513, 521-25 (2000); *Collins v. Youngblood*, 497 U.S. 37, 41-42, 46 (1990).)

8. *See*, *Robertson*, 33 Cal. 3d at 52; *People v. Weidert*, 39 Cal. 3d 836, 842, 705 P.2d 380, 218 Cal. Rptr. 57 (1985); *People v. Kimble*, 44 Cal. 3d 480, 501, 749 P.2d 803, 244 Cal. Rptr. 148 (1988) (*Kimble*); *People v. Silva*, 45 Cal. 3d 604, 632, 754 P.2d 1070, 247 Cal. Rptr. 573 (1988); *People v. Wright*, 52 Cal. 3d 367, 416-417, 802 P.2d 221, 276 Cal. Rptr. 731 (1990); *People v. Raley*, 2 Cal. 4th 870, 902-903, 830 P.2d 712, 8 Cal. Rptr. 2d 678 (1992); *People v. Mendoza*, 24 Cal. 4th 130, 6 P.3d 150, 99 Cal. Rptr. 2d 485 (2000); *People v. Valdez*, 32 Cal. 4th 73, 113, 82 P.3d

was an afterthought, as in *Green*, or if it added nothing to defendant's guilt, as in *People v. Thompson*, 27 Cal. 3d 303, 321-324, 611 P.2d 883, 165 Cal. Rptr. 289 (1980), where robbery was a pretext and the intent all along was to kill the victims.

When Clark was tried, the statute required only that "the murder [be] committed while the defendant was engaged in ... the commission of ... , or the immediate flight after committing ... the ... [felony]" – here arson of an inhabited structure. *Clark*, 50 Cal. 3d at 606. It does not, and never did, require the murder *to advance* the commission of the felony. *Horning*, 34 Cal. 4th at 907. Here, the arson was not merely incidental to David Gawronski's murder (Clark's intended crime), but had an independent purpose: to set fire to the Gawronski home, to drive David and Ava out so that Clark could shoot David in Ava's presence, to hurt Ava: thus, *Green* is inapplicable. *Robertson*, 33 Cal. 3d at 52.

Green did not establish an element of special circumstance. *Valdez*, 32 Cal. 4th at 113, affirming *Kimble*, 44 Cal. 3d at 501. The instruction not being constitutionally required, it was not error to omit it where *Green* was inapplicable. The requirement of a temporal, non-trivial nexus between commission of the felony and the murder under the felony-murder special circumstance statute was unaltered by admitting a concurrent intent to kill. The over-expansive *Green* instruction, correct under *Green*'s facts, misstates what is constitutionally required under the felony-murder special circumstance statute. In any case, instructional error under state law provides no basis for federal habeas relief under *Lewis v. Jeffers*, 497 U.S. at 780, and *Estelle v. McGuire*, 502 U.S. at 72.

Murtishaw held in 1981 that felony-murder applied where there was a concurrent intent to kill, and *Robertson* established in 1982 the inapplicability of *Green* when an independent purpose exists for the felony. Whether Clark was entitled to a *Green* instruction was an issue of criminal trial procedure, and *Green*

(..continued)

296, 8 Cal. Rptr. 3d 271 (2004); *Horning*, 34 Cal. 4th at 907; *People v. Davis*, 36 Cal. 4th 510, 568-569, 115 P.3d 417, 31 Cal. Rptr. 3d 96 (2005).

being inapplicable to *Clark*'s facts, the instruction was properly omitted after *Murtishaw* and *Robertson*.

Defendants do not have the same interest as the state in the non-retroactivity rule under *Teague v. Lane*, that rule being grounded in the states' strong interest in the finality of judgments. *Lockhart v. Fretwell*, 506 U.S. at 371-373. Clark was not entitled to "have the state court make an error in his favor." *Nix v. Whiteside*, 475 U.S. at 186-187 (Blackmun, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Ninth Circuit's decision and procedures in conducting a due process analysis of state court judgments.

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